In The

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-537

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, et al.,

Petitioners,

v.

HOWARD HOPKINS, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondents, Howard Hopkins and Rita Kimball (Coleman) (hereinafter referred to collectively as "Respondents"), hereby files their opposition to granting the Writ of Certiorari in the above captioned matter.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 533 F2d 163 and reproduced in Petitioner's Application (Pet. App.) pages A-1 thru A-27. The memorandum opinion of the United States District Court for the Northern District of Texas (Pet. App. A-28 thru A-35) is reported at 378 F.Supp. 1258.

JURISDICTION

The Court of Appeals denied rehearing on August 9, 1976. The petition for writ of certiorari was filed within ninety (90) days of that date. Jurisdiction of this Court is invoked under 28 USC 1254(1).

QUESTIONS PRESENTED

Do the provisions of the Civil Rights Act of 1964[1] and of the Equal Employment Opportunity Act of 1972,[2] when harmonized with the union security provisions of the Labor Management Relations Act of 1947 (Taft-Hartley),[3] require accommodation to an employee's religious beliefs.[4]

STATUTORY PROVISIONS INVOLVED

The relevant portion of all the Acts are set forth in the petition.

COUNTER-STATEMENT OF THE CASE

Howard Hopkins and Rita Kimbell (Coleman)[5] brought suit for injunctive relief to prevent their discharge under an agency shop provision of a collective bargaining agreement between the petitioning unions and their employer, General Dynamics.

[1] 42 USC 2000e-2

[2] 42 USC 2000e(j)

[3] 29 USC 158(a)(3); (b)(2)

[4] As pointed out by Petitioners, the question of whether 701(j) covers charity-substitution (union security) cases such as this one, or only Sabbatarian-type cases, is necessarily a part of the determination.

[5] This case was initially styled *Cooper, et al vs. General Dynamics, et al.* Howard Cooper was non-suited for medical reasons at the Trial Court level.

Respondents are employed at General Dynamics, Convair Aerospace Division, and former members of the International Association of Machinists.[6] The unions have for many years represented a production and maintenance collective bargaining unit at General Dynamics of which Respondents are a part. Respondent Kimbell (Coleman) has been employed at General Dynamics since 1950 where she has worked in many capacities. She joined the union in 1953 and remained a member for approximately 8 years. She withdrew membership from the union and ceased paying monies in 1961 because of her religious belief that to be a member of or pay monies to a union violated the teachings of her God.

Respondent Hopkins has been employed at General Dynamics since 1946, where he is presently a quality control analyst. He became a member of the IAM in 1950 and remained a member until 1967. He withdrew membership from the union by letter of March 17, 1967, stating that it was for religious reasons that he could no longer be a member of or pay monies to a labor organization.

Both Respondents are over sixty (60) years of age and have at least twenty-five (25) years tenure with General Dynamics. They are also members of the Seventh-Day Adventist Church, a religious organization with 500,000 members in the United States and about two and one-half million members in the world. For at least the last 75 years, the Church has taught its members that they should not join or financially support labor unions. When a Church member, once he understands the Church's doctrine, contributes money to a labor organization he places his soul in jeopardy and denies himself a chance for eternal life and salvation. Respondent Kimbell (Coleman) joined the Church in 1945 in New Mexico and has been a member of the Church in Ft. Worth, Texas since 1950. Respondent Hopkins has been a member of the same local Church since 1954. As the Trial Court

[6] Respondent adopts Petitioner's footnote that both the International Association Machinists and International Association Machinists District Lodge 776 are referred to collectively as "IAM" or sometimes as "Union".

found, both of these Respondents are sincere in their religious beliefs that they should not be a member of or pay monies to a labor organization. These beliefs are based upon their reading of the Bible, the teachings of the Church and the Spirit of Prophecy, the writings of Ellen G. White who is accepted as a prophetess by the Church.

In September, 1972, the IAM for the first time sought and obtained an agency shop provision in the collective bargaining agreement requiring the payment of monies to the union equal to its regular dues and initiation fees as a condition of continued employment. Respondents were advised that they would be discharged because they would not pay monies to the union in violation of their religious beliefs. They brought this suit to prevent their dismissal after over a quarter of a century of service to their employer, and they have established trust funds as temporary coffers of monies equal to their union dues to be paid to a designated charity.

The trial court ordered the case dismissed by finding that there was no conflict between the Respondents' religious beliefs and the agency shop agreement which authorized their discharge (Pet. App. A-34). Thus, the trial court never reached the question presented herein for review, the interplay between 701(j) and 8(a)(3).

The union on appeal before the Fifth Circuit supported the trial court's dismissal on essentially three grounds 1) Section 701(j) does not amend or modify the provisions of 8(a)(3) 2) if Section 701(j) is read to harmonize with 8(a)(3), its effect applies to only Sabbatarian worship 3) Section 701(j) really only applies to employers—not labor unions. (Brief and Reply Brief, IAM to the Fifth Circuit, page 8)

The Circuit Court dealt squarely and directly with these contentions holding contrary to the union's position. While the panel was divided on the issue of which of the Defendants were entitled to the defense of undue hardship, the majority was unequivocal that (1) both the union and employer must accommodate the Respondents' religious beliefs (2) Section 701(j) reaches religious beliefs covering not only Sabbatarianism, but also membership in or payment of monies to a labor organization (3) both the union and employer had a duty to accommodate and were both entitled to the defense of undue hardship.

Thus the union seeks certiorari on the very limited issue whether they must accommodate employees' religious beliefs which forbid his or her financial support of a labor organization.

ARGUMENT AGAINST GRANTING THE WRIT

1. The balance of 701(j) with 8(a)(3) accurately reflects the latest Congressional policy in the field of labor relations.

In the Court's recent decision of *Franks v. Bowman Transportation Company*[7], the Court reaffirmed the recent change in Congressional policy concerning individual rights in the employment sector:

> "We begin by repeating the observation of earlier decisions that in enacting Title VII of the Civil Rights Act of 1964, Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex or national origin. *Alexander v. Gardner-Denver*, 415 U.S. 36, 44 (1974); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1972); *Griggs v. Duke Power Company*, 401 U.S. 424, 429-430 (1971), and ordained that its policy of outlawing

[7] ____ U.S. ____, 47 L.Ed.2d 444, 96 S.Ct. ____

such discrimination should have the "highest priority," *Alexander,* supra, at 47; . . . ."

When the union movement was fledgling cause in our nation's history, it became Congressional policy to protect that labor movement. It became apparent in the 1940's and 50's that the labor union movement had come of age, and Congressional policy moved toward fostering collective bargaining. Legislation in the last 10 years has shown a new concern in the field of labor relations. The majoritarian rights have given way to individual rights to have equal employment opportunity in the work force. It is now the highest priority of Congress that employees be free from discrimination in the arena of employment, and attorneys for plaintiffs in Title VII cases are in the nature of private attorney generals seeking compliance with this Congressional mandate.[8] Just as the labor policy emerged in favor of arbitration, the latest Congressional policy of freedom from discrimination is the commitment of our country.[9]

It is the position of the Respondents that the interaction of 701(j) and 8(a)(3) must be read together to arrive at today's Congressional policy in the field of labor relations. Just as the Supreme Court adheres to a policy of construing federal statutes to avoid serious doubt of their constitutionality,[10] this Court also follows the policy of reading together federal statutes which apparently are at variance.[11] Dealing with the balance in effect between Norris-LaGuardia and the subsequently enacted proviso to paragraph 301(a) of the LMRA, this Court in *Boys Market* said:

[8] *Newman v. Piggy Park Enterprises* 390 US 400 (1968)
[9] *Alexander v. Gardner-Denver Company* 415 US 36 (1974)
[10] *International Association of Machinists v. Street* 367 US 740 (1961)
[11] *Boys Market v. Retail Clerks Union* 398 US 235 (1970)

"The literal terms of paragraph 4 of the Norris-LaGuardia Act must be *accommodated* to the subsequently enacted provisions of paragraph 301(a) of the Labor Management Relations Act and the purposes of arbitration. Statutory interpretation requires more than concentration upon isolated words; rather, consideration must be given to the total corpus of pertinent law and the policies that inspired austensibly inconsistent provisions . . .

The Norris-LaGuardia Act was responsive to a situation totally different from that which exists to date . . .

As labor organizations grew in strength and developed toward maturity, congressional emphasis shifted from protection of the nascent labor movement into the encouragement of collective bargaining and to administrative techniques for peaceful resolution of industrial disputes. This shift in emphasis was accomplished, however, without extensive revision of many of the older enactments, including the anti-injunction section of the Norris-LaGuardia Act. Thus it became the task of the court to *accommodate,* to reconcile the older statutes with the more recent ones." (emphasis supplied)

Section 7 of the NLRA (29 USC 157) is the cornerstone of the majoritarian rights of employees to act collectively. Section 8(a)(3) of the NLRA (29 USC 158) prohibits discrimination against an employee in regard to hire or tenure of employment. This prohibition runs a true course through the other provisions of the NLRA to protect individual employees except for proviso of 8(a)(3) which carves out an exception for union security. Without the proviso to 8(a)(3), a union security provision and a collective bargaining agreement would, on its face, violate 8(a)(1) by interfering with, restraining, or coercing employees; would violate Section 8(a)(2) prohibiting an employer from "contributing financial or other support" to a union; and, would

violate 8(a)(3) because it is discrimination in regard to "tenure of employment".[12]

Thus, the agency shop agreement sought and obtained by the IAM only has the dignity of a contractual provision allowed by proviso to an otherwise general rule against discrimination.[13]

There exists a license to discriminate. Without the proviso to 8(a)(3), the IAM would be restraining and coercing employees in

[12] "Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, *and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).*" (emphasis supplied)

"Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to Section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in Section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in Section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in Section 9(3) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement* * *"

[13] Pet. App. page 7

violation of 8(b)(1)(a), and would be causing an employer to discriminate in violation of 8(b)(2).[14]

It was against the background of this proviso that the Fifth Circuit decided a private contract between private parties to discriminate will not be exalted above the expressed statutory commands against discrimination. Admittedly, the Courts have held against individual employees whose First Amendment rights were balanced against union security clauses *prior* to the passage of 701(j). Congress placed a balance into their new legislation which provided the right to individual freedom qualified by undue hardship. What employees had been seeking under First Amendment sanctions was complete exemption from union security regardless of its impact, financially or otherwise, on the unions. Congress weighed and balanced the considerations previously sanctioning union security, and gave to the employees the right of religious freedom in the employment sector if such freedom did not cause undue hardship to others. The requirement to accommodate by unions is a qualified right given to employees under Title VII; the First Amendment protection is an absolute right which was sought unequivocally against the unions. Congress further evidenced its new attitude over equal employment by amending the National Labor Relations Act to grant absolute rights to employees in the health care industry.[15]

[14] 8(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7* * *"

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3)* * *"

[15] 29 USC 169. Contrary to the position of the IAM, Respondents contend that Section 19 grants additional coverage than that afforded under Title VII. This additional coverage indicates not only a new Congressional attitude, but also solidifies that "charity-substitution" is a reasonable form of accommodation for 701(j). cf. Judge Gee 533 F.2d.170, Pet. App. A-13.

2. The Fifth Circuit Correctly Decided the Issue on Duty to Accommodate

The IAM has presented for review a single question that is susceptible of answer only in a bifurcated state. Paraphrasing Judge Rives in his opinion (concurring in part and dissenting in part) the issues are as follows: (1) "Does Title VII impose a duty on the employer and unions to accommodate the religious beliefs of employees and (2), if so, does that duty extend to religious beliefs concerning payment of monies to unions.

A. Duty to Accommodate

At the outset it should be pointed out that all members of the Fifth Circuit panel agreed that the union owed a duty to accommodate. The only dissent was from Judge Rives as to the scope of that duty (533 F2d. @ 175; Pet. App. A-23). The question presented for review suggests that no duty exists; but, if so, only to the extent of an employee's Sabbatarian beliefs.

The statutory duty is imposed by the precise language of 701(j). As traced by Judge Gee, and briefed extensively at the lower Courts, 701(j) was enacted in response to this Court's affirmance in *Dewey v. Reynolds Metal.*[16] The Sixth Circuit had expressed doubts in *Dewey* that EEOC had power to adopt such guidelines as regulation 1605.1.[17] The Courts by 1971 treated religion cases under the regulation as lawful if they were applied without discriminatory intent.[18]

Congress could not have made in more clear terms its disapproval of the Court's treatment by enacting the most precise

[16] 402 US 689 (1971)

[17] 29 CFR 1605.1(b)

[18] A curious treatment clearly disapproved by the Supreme Court.in 1971 in *Griggs v. Duke Power Company* 401 US, @ 432. (1971)

of statutory language. ("All aspects of religious observance and practice, as well as belief") The Congressional record does indeed show that these terms extend to any belief that can be termed religious.[19]

The one Circuit Court dealing with the duty to accommodate under regulation 1605.1 (as opposed to 701(j) as presented in this case) found that both the company and union had a duty to accommodate.[20] Conceptually if the lower Courts were to be in agreement with Petitioner's argument of "no duty", there would be no reason to reach a discussion of accommodation or hardship (Pet. App. A-28 thru A-50). Thus far the Fifth and Ninth Circuits have consistently remanded to the trial courts with instructions that the union and company are to accommodate.[21]

B. Scope of Duty to Accommodate

Congress has spoken in broad terms which cannot be misunderstood. The encompassing verbiage, "*all* aspects of religious observance and practice, as well as belief", is entitled to the widest of judicial application. The legislative history of 701(j) is supportive of this wide scope of afforded protection.[22] As previously pointed out the Senate floor discussion showed that

[19] 118 Congressional Record, page 713, Senator Dominick indicates that 701(j) would extend protection to a religious sect such as the Amish. Amish are not Sabbatarians, and possess other beliefs at variance with the Respondents. This again evidences a qualified protection to all religious beliefs if they do not constitute hardship.

[20] *Yott v. North American Rockwell* 501 F2d 398, 403 (CA 9, 1974)

[21] *McDaniel v. Essex* is on appeal to the Sixth Circuit in 76-1674; *Burns v. Southern Pacific Transportation Company, et al* is on appeal to the Ninth Circuit in 76-1188.

[22] See the Fifth Circuit opinion, footnote 9, 533 F2d. @ 168 (Pet. App. A-8, 9). Footnote 9 also shows comments from the Chairman of the House Committee . . . "reasonable accommodations for employees whose religion may include observances, practices, and beliefs *such as Sabbath observance* . . ."

the protection was to extend to the Amish who are not Sabbatarians. One Circuit Court has even given broad scope in affording coverage under 701(j) to an atheist's beliefs. *Young v. Southwestern Savings and Loan* 509 F2d 140 (CA 5, 1975) Certainly, the appellate courts have yet to disagree on the union's duty to accommodate religious beliefs in light of union security provisions authorized by statute.

3. There is no Conflict Among the Circuit Courts of Appeal

There are only two appellate decisions that have attempted to resolve the question raised by Petitioners. In *Yott,* as previously indicated, the Ninth Circuit actually deals with harmonizing a union security provision with regulation 1605.1. On the other hand, the Fifth Circuit in the present case squarely dealt with the interplay between the agency shop clause and 701(j). The opinion in *Yott* was unanimous that the union owed a duty to accommodate. The Fifth Circuit's unanimous agreement that the union owed a duty to accommodate necessarily implies a finding that 701(j) "reaches" 8(a)(3). The majority of the panel found that accommodation extended to religious beliefs against the payment of monies to unions. While the door is not yet closed on the judicial guidelines for undue hardship, the duty to accommodate in face of union security has been consistently announced.

CONCLUSION

The IAM's position that union security authorized by 8(a)(3) is the impregnable pivotal point of our labor policy is untenable. The Congress has given a qualified right of reasonable accommodation to employees in application of their religious beliefs to the work sector. When these two competing interests are read side by side, they can be harmonized by implementing Congress's

mandate so that discrimination is removed in the field of employment. The harmonizing necessarily requires the relinquishment of majoritarian rights only to the extent that would cause undue hardship.

Congress spoke in words of resounding broadness in the duty and scope of accommodation to be given. Religious beliefs of both atheist and religious believers are to be accommodated. The views of all of Congress are not to be reflected by general discussion of Sabbatarianism.

The panel of judges for both the Fifth and Ninth Circuits are in complete agreement that under Title VII there exists a duty to accommodate. It is implicit in this conclusion that accommodation is owed that 701(j) reaches and compliments 8(a)(3) as a pronouncement of today's national labor policy.

For the above reasons, the writ of certiorari should be denied.

Respectfully submitted,

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